## **U.S. Department of Labor**

Office of Administrative Law Judges 800 K Street, NW, Suite 400-N Washington, DC 20001-8002

(202) 693-7300 (202) 693-7365 (FAX)



Issue date: 30Sep2002

In the Matter of:

Case No.: 2002-CAA-00022

**HUGH B. KAUFMAN,**Complainant,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

#### ORDER GRANTING PARTIAL SUMMARY DECISION

Complainant, Hugh B. Kaufman ("complainant"), submitted a complaint to the Occupational Safety and Health Administration, United States Department of Labor (DOL) on April 3, 2001, and a second complaint on May 2, 2001, against the United States Environmental Protection Agency (EPA) ("respondent"). The complainant requests relief under the employee protection provisions of seven environmental protection statutes: the Clean Air Act (CAA), 42 U.S.C. § 7622; the Safe Drinking Water Act, 42 U.S.C. § 300j-9; the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1367; the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610; the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622, and the Energy Reorganization Act, 42 U.S.C. § 5851 (collectively "whistleblower retaliation" claims).

Complainant is an employee of the respondent, assigned to the Office of Solid Waste and Emergency Response (OSWER).<sup>1</sup> Complainant has been assigned to the position of Program Analyst, where his major duties include analyzing assigned policy issues, assisting in the development of national and local policy in connection with EPA's solid waste and emergency and remedial response programs.<sup>2</sup> Complainant asserts that respondent retaliated against him because he engaged in protected activity under the aforementioned environmental statutes.<sup>3</sup>

<sup>&</sup>lt;sup>1</sup>Claimant's Brief at 4; Respondent's Brief at 4.

<sup>&</sup>lt;sup>2</sup>Respondent's Brief at 5; Kaufman Declaration ¶ ¶ 3, 4.

<sup>&</sup>lt;sup>3</sup>Complainant's April 3, 2001 Complaint at 1-2.

On August 6, 2002, the respondent filed a Motion to Dismiss or, in the Alternative, for Summary Decision with regards to the two complaints filed by complainant "on the grounds of lack of subject matter jurisdiction, sovereign immunity, failure to state a claim, and statute of limitations." Complainant filed an Opposition To Respondent's Motion To Dismiss Or, In The Alternative, For Summary Decision on September 6, 2002 and Respondent filed a Reply To Complainant's Opposition on September 18, 2002.

#### I. Exclusivity of the Collective Bargaining Agreement

The respondent argues that the DOL does not have jurisdiction over the complainant's claims in this matter because they are grievances which fall within the scope of a collective bargaining agreement (the CBA), and the resolution of such grievances is exclusive to the negotiated grievance procedures of that CBA.<sup>5</sup>

The Civil Service Reform Act of 1978, as amended (the CSRA), requires the collective bargaining agreements of labor unions representing federal employees to "provide procedures for the settlement of grievances," and those procedures "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1). In the case at bar, the complainant is a member of a bargaining unit covered by a CBA between the EPA and the American Federation of Government Employees.<sup>6</sup> The CBA contains a grievance procedure covering grievances by the employee "concerning any matter relating to the employment of any employee" or concerning "[a]ny claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment." Furthermore, the CBA provides that the grievance procedure "constitutes the sole and exclusive procedure for the resolution of grievances by employees of the bargaining units." Unresolved grievances may be submitted to binding arbitration.<sup>9</sup>

Legislative history reveals that the procedures of the CSRA are not meant to be the exclusive remedy for employees asserting claims under whistleblowing protection statutes. *See e.g., Pogue v. United States Department of the Navy*, No. 87-ERA-21, 8-9 (DOL Off. Adm. App. May 10, 1990) (finding the DOL had jurisdiction to hear whistleblowing retaliation claims arising from CERCLA, and denying the Navy's claim that CERCLA does not cover federal employees

<sup>&</sup>lt;sup>4</sup>Respondent's Brief at 1.

<sup>&</sup>lt;sup>5</sup>Respondent's Brief at 8.

<sup>&</sup>lt;sup>6</sup>Respondent's Brief at 4, Shapiro Declaration ¶ 7.

<sup>&</sup>lt;sup>7</sup>Respondent's Brief at 5, citing CBA p. 85 (Attachment 5 to Shapiro Declaration).

<sup>&</sup>lt;sup>8</sup>Respondent's Brief at 5-6, citing CBA p. 85 (Attachment 5 to Shapiro Declaration).

<sup>&</sup>lt;sup>9</sup>Respondent's Brief at 5, citing CBA p. 89 (Attachment 5 to Shapiro Declaration).

because the CSRA established a comprehensive scheme to address all claims concerning adverse personnel actions). As relied on in *Pogue*, Congressional intent with regards to the CSRA is found in the Joint Explanatory Statement for the Whistleblower Protection Act of 1989 (WPA), "which amended § 2302 (b) (8) of the CSRA to strengthen the protection afforded whistleblowers:"

The bill contains a new section 1222 of title 5, United States Code, which provides that the network of rights and remedies created under chapter 12 and chapter 23 of title 5 is not meant to limit any right or remedy which might be available under any other statute. Other statutes which might provide relief for whistleblowers include the Privacy Act, a large number of environmental and labor statutes which provide specific protection to employees who cooperate with federal agencies, and civil rights statutes under title 42, United States, Code. Section 1222 is not intended to create a cause of action where none otherwise exists or to reverse any court decision. Rather, section 1222 says it is not the intent of Congress that the procedures under chapters 12 and 23 of title 5, United states Code are meant to provide exclusive remedies.

Pogue, at 9-10, citing 135 Cong. Rec. §§ 2782 (daily ed. March 16, 1989); 135 Cong. Rec. H750 (daily ed. March 21, 1989) (emphasis supplied). The Secretary of Labor concluded that "the legislative statement in the WPA makes it clear that Congress does not intend that a Federal whistleblower [sic] should be barred from remedies available under CERCLA." Pogue, at 9. Although the courts have not specifically considered the impact of a CBA on the statutorily created whistleblowing remedies, its seems a clear extension of the Secretary's rationale in Pogue that if the CSRA does not provide an exclusive remedy for whistleblowing claims, then a CBA would not either.

Conversly, the respondent argues that the Second Circuit's opinion in *O'Connell v. Hove*, 22 F.3d 463 (2d Cir. 1994), and the Federal Circuit's opinion in *Muniz v. United States*, 972 F.2d 1304 (Fed. Cir. 1992), support the contention that the grievance procedures of a CBA are the exclusive procedures for resolving claims arising under federal statute. See O'Connell, at 468 (holding that overtime claims of unionized federal employees arising under the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201-19 (1982)) are exclusively subject to negotiated grievance procedures set forth in CBA); accord Muniz, at 1311. These cases base their strict adherence to the broadly-worded CBAs that limit jurisdiction to out-of-court grievance procedures, on the view that "nothing in the CSRA prevents the plaintiff employees" from removing through negotiations "some or all" of the statutorily created remedial rights from the purview of the alternative grievance procedures contained in their CBAs. O'Connell, at 468; see Muniz, at 1311; but see Brown V. ABF Freight Systems, Inc., 183 F.3d 319, 322 (4th Cir. 1999) (the Fourth Circuit requires a CBA to contain clear and express language waiving a particular statutory right to a judicial forum). However, O'Connell and Muniz lack the exceptional governmental interests and/or public safety concerns that exist in the case at bar, and elevate the

<sup>&</sup>lt;sup>10</sup>Respondent's Brief at 10.

grievance outside of the CBA. The violation of rights alleged by the *O'Connell* and *Muniz* plaintiffs were purely pecuniary, arising from their employers' noncompliance with the FLSA statute that sets forth a mandated overtime rate and confers jurisdiction on the courts to hear complaints for violation of that rate. *See O'Connell*, at 468; *see also Muniz*, at 1309. The application of *O'Connell* and *Muniz* can not be expanded to encompass claims of whistleblower retaliation because of the complexity of interests including the public interest inherent in whistleblower protection statutes. *O'Connell* and *Muniz* are rightfully limited to general grievances, such as alleged violations of the FLSA.

Although whistleblower retaliation claims and traditional employment discrimination claims have analogous compensatory and prophylactic objectives, whistleblower retaliation claims have heightened public policy considerations. As explained by the Judge in *Hall v. U.S. Army, Dugway Proving Ground*, 1997-SDW-00005 (ALJ August 8, 2002):

Cases under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e-5, have guided the Secretary and the Administrative Review Board (ARB) in fashioning remedies appropriate to abate violations. *Hobby v. Georgia Power Co.*, No. 90-ERA-30, slip op. at 15 (ARB Feb. 9, 2001). Like the remedies under Title VII, those available under the environmental whistleblower laws serve a twofold purpose. First, they are intended to make the complainant whole by placing him, "as near as may be, in the situation he would have occupied if the wrong had not been committed." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975). Second, they must "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 418, quoted in *Hobby* at 7 (ARB's emphasis). This goes beyond the interest of employees in protection from discrimination. It also serves the public interest in assuring exposure of threats to public health and safety, such as the discharge of sewage into streams, rivers and lakes. *See Beliveau v. DOL*, 170 F.3d 83, 88 (1st Cir. 1999).

*Id.*, quoting Moder v. Village of Jackson, Wisconsin, 2000-WPC-0005 (ALJ Aug. 10, 2001). The government has an important interest in assuring compliance with whistleblower protection statutes because those statutes not only protect employees from the effects of discrimination and deter future similar conduct, but they promote public safety and government efficiency.

The respondent correctly points out that there is a strong "federal policy favoring arbitration" for the resolution of disputes. Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 24 (1983). Simultaneously, there is a strong policy favoring the resolution of whistleblower retaliation suits in the DOL; however, that policy requires assurance by the DOL that the public interest is protected. See Beliveau v. U.S. Dept. of Labor, 170 F.3d 83, 87-88 (1st Cir. 1999), citing Hoffman v, Fuel Econ. Contracting, 97-ERA-

<sup>&</sup>lt;sup>11</sup>Respondent's brief at 8.

33, n.4 (Sec'y Order Denying Request to Reconsider, August 4, 1989). The Secretary of Labor stated in *Hoffman*:

The Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms but health and safety hazards to the public. The Secretary represents the public interest by assuring that settlements adequately protect whistleblowers.

Hoffman, at 35. The First Circuit interpreted Hoffman as reaffirming the "Secretary's critical role in determining that a settlement is 'just and reasonable and in the public interest,' a role that is equally important throughout every stage of the process that begins with the filing of a complaint." Beliveau, at 88. Once a whistleblower retaliation complaint is filed, "statutory language authorizes only three options: (1) an order granting relief; (2) an order denying relief; or (3) a consensual settlement involving all three parties." Macktal v. Secretary of Labor, 923 F.2d 1150, 1153 (5th Cir. 1991) (emphasis added). The Fifth Circuit continues, "[t]he words of the statute require the Secretary to take one of three actions once a complaint is filed. The statute makes no exception for cases in which the complainant and the company reached an independent settlement." Id. at 1154 (footnote omitted). Because of the strong governmental interest in whistleblower retaliation cases, private arbitration of such grievances would impermissibly omit the government from the case and extinguish its ability to vindicate the public interest in a resolution of the matter. Therefore the CBA can not be found to deprive the DOL of jurisdiction in the resolution of whistleblowing retaliation grievances.

# II. Sovereign Immunity and the Toxic Substances Control Act (TSCA)

The complainant has asserted a violation of the employee protection provision of the TSCA, which states, in part, "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee" has engaged in protected activity. 15 U.S.C. § 2622(a). The respondent argues that the term "employer" in the TSCA does not include the United States, an unconsenting sovereign, and therefore the claims under TSCA should be dismissed because the DOL lacks jurisdiction to hear these claims. 12

It is well settled that the United States is immune from suit unless it consents or unequivocally waives sovereign immunity in statutory text. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980), *quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941). The employee protection provisions of the TSCA do not contain an express waiver of sovereign immunity necessary to bring suit against the Unites States in any court. *See Stephenson v. NASA*, 1994-TSC-00005 (Dec & Ord. of Remand, July 3, 1995) (After close review of the employee protection provisions of the TSCA, the Secretary of Labor did not find an unequivocal waiver of

<sup>&</sup>lt;sup>12</sup>Respondent's Brief at 12.

sovereign immunity; hence the private suit against a federal agency was dismissed). Because the United States has not waived its sovereign immunity with regard to the TSCA, it is not an "employer" for the purposes of the TSCA, and the DOL lacks jurisdiction to hear claims against the United States EPA arising under the TSCA.

### III. Jurisdiction under the Energy Reorganization Act (ERA)

The respondent argues that for purposes of the ERA, the DOL does not have jurisdiction over the EPA because it is not within the definition of employer under the ERA. Section 5851(a)(2) of the ERA provides:

For purposes of this section, the term "employer" includes—

- (A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);
- (B) an applicant for a license from the Commission or such an agreement State;
- (C) a contractor or subcontractor of such a licensee or applicant; and
- (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344. 42 U.S.C.A. §§5851 (Supp. 1995).

This issue, whether the United States can be included in the ERA's definition of "employer" based on an unequivocal intention by Congress to allow plaintiffs to assert claims of ERA violations against government agencies, has been previously been decided in the negative. *Williams v. Y-12 Nuclear Weapons Plant*, 1995-CAA-00010 (ALJ August 2, 1995) (evaluating the ERA's statutory language and legislative history to find that Congress did not intend for the Department of Energy (DOE) to be considered an "employer" under the act), *aff'd on these grounds in Williams v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-059 (ARB Jan. 31, 2001) (holding that the ALJ correctly dismissed complainant's ERA and TSCA causes of action against the governmental agency on sovereign immunity grounds); *see also Johnson v. Oak Ridge Operations Office*, ALJ Case Nos. 1995-CAA-00020, 21 & 22, ARB Case No. 97-057 (Sept. 30, 1999); *Teles v. Department of Energy*, 94-ERA-22 (Sec'y, Aug. 7, 1995). Therefore, the EPA is not an "employer" under the ERA because Congress did not unequivocally waive the government's sovereign immunity.

Complainant's reliance on *Jayko v. Ohio Environmental Protection Agency* to support the contention that the United States sovereign immunity has been waived with regard to the ERA is faulty. 1999-CAA-00005 (ALJ Oct. 2, 2000). In *Jayko*, the ALJ held that the sovereignty of the Ohio EPA had been waived with regard to the ERA after an analysis of both the statutory text and the presumed policies behind environmental whistleblower statutes. *See Jayko*, at 63-65. Initially, its relevant to note that *Jayko* is not on point with this case because the respondent in

Jayko is the State of Ohio, obviating the need for any federal sovereign immunity waiver analysis. Moreover, the ALJ's opinion was reversed on the issue of state waiver of sovereign immunity. See State of Ohio Environmental Protection Agency v. United States Dept. of Labor, slip op. No. C2-00-1157 (S.D. Ohio Nov. 14, 2000) (holding a private claim against the State of Ohio under environmental whistleblower statutes may not be maintained because Congress did not intend to abrogate the Eleventh Amendment immunity in its enactment of whistleblower statutes). Therefore the "liberal" approach to statutory interpretation that the complainant urges this tribunal to employ stands at odds with stare decisis and violates the well established directives for narrowly construing a waiver of federal sovereign immunity. See Dept. of the Army v. Blue Fox, 525 U.S. 255, 260 (1999). ("a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign"). Because the United States EPA is not a covered employer under the ERA, the DOL does not have subject matter jurisdiction and the complainant's allegation of a violation of the ERA is dismissed.

## IV. Statute of Limitations

The respondent argues that the filing of the complaint in this matter was not timely; i.e., the whistleblower retaliation occurred outside the statute of limitations period proscribed for such violations. The complainant alleges violations of the employee protection provision of CERCLA, The Clean Air Act, the Federal Water Pollution Control Act, The Solid Waste Disposal Act, and The Safe Drinking Water Act, all which have a 30 day statute of limitations period for filing a violation. 42 U.S.C. § 9610(b); 42 U.S.C. § 7622(b); 33 U.S.C. § 1367(b); 42 U.S.C. § 6917(b); 42 U.S.C. § 300-9(i)(2)(A). The complainant filed his first complaint with the DOL on April 3, 2001, alleging violations of the employee protection provisions contained in the five aforementioned statutes ("whistleblower protection statutes"). Therefore, to be timely, a violation of those statutes, giving rise to the complaint in this matter, must have arose on or after March 5, 2001.

The complainant alleges in his Complaint, *inter alia*, that on March 16, 2001, an adverse

<sup>&</sup>lt;sup>13</sup>See Complainant's Brief at 28.

<sup>&</sup>lt;sup>14</sup>The complainant also asserts violations under the TSCA and the ERA, having the statue of limitations period of 30 days and 180 days, respectively. 15 U.S.C. § 2622(b); 42 U.S.C. § 5851(b)(1). However, because this tribunal has dismissed the claims under the TSCA and ERA for lack of subject matter jurisdiction, they are not considered for purposes of the foregoing statute of limitations analysis.

<sup>&</sup>lt;sup>15</sup>The Second Complaint was filed on May 3, 2001. The Second Complaint reasserted the allegations of the first complaint and added a claim under the ERA. As previously noted, because the there is no jurisdiction for that ERA claim, only the filing date of the First Complaint will be considered in this statute of limitation analysis.

employment action took place in violation of the whistleblower protection statutes.<sup>16</sup> However the respondent contends that the employment actions aggrieved by the complainant, including the March 16, 2001 incident, "were merely the continuing effects or consequences of the Agency's final December 14, 2000 decision."<sup>17</sup> The Administrative Review Board explained the operation of the statute of limitations in *Overall v. Tennesee Valley Authority*, ARB No. 98-111 (ARB Apr. 20, 2001) as follows:

Statutes of limitation run from the date an employee receives final, definitive and unequivocal notice of an adverse employment decision. The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation. See generally *Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

Overall v. Tennesee Valley Authority, ARB No. 98-111 at \*34, ALJ No. 1997-ERA-00053 (ARB Apr. 20, 2001).

The ARB has reasoned that the running of the statute of limitations may be postponed until the time that the adverse decision is discovered:

Claim accrual is the date a statute of limitations begins to run, i.e., the date a complainant discovers he has been injured. Accrual may differ from the date the respondent decides to inflict injury which may pre-date a complainant's discovery of the injury. This "discovery rule" may operate to postpone the beginning of a limitations period which, as the *Cada* court notes, is consistent with *Delaware State College v. Ricks*, 449 U.S. at 258 (statute of limitations begins to run at the time the adverse decision is made and communicated to an employee). *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 450. This Board essentially has applied the discovery rule in holding that statutes of limitation in whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights. *Whitaker v. CTI-Alaska, Inc.*, ARB Case No. 98-036, ALJ Case No. 97-CAA-15, ARB Dec.

<sup>&</sup>lt;sup>16</sup>E.g., the Complainant alleges on March 16, 2001 he was "prohibited form performing investigations for the EPA Ombudsman."

<sup>&</sup>lt;sup>17</sup>It is not in dispute that on December 14, 2000, the complainant received notice that he would not receive any ombudsman-related assignments and stated references to such duties would be deleted from his position description. Declaration of Kaufman at 3.

& Rem. Ord., May 28, 1999, slip op. at 7-8; *Ross v. Florida Power & Light Co.*, ARB Case No. 98-044, ALJ Case No. 96-ERA-36, ARB Fin. Dec. & Ord., Mar. 31, 1999, slip op. at 4; *McGough v. U.S. Navy*, Case Nos. 86-ERA-18/19/20, Sec. Dec., June 30, 1988, slip op. at 9-10.

*Id.* at 34-35. Hence, in order for the complainant to maintain a cause of action in this case, any adverse employment action by the respondent afer March 5, 2001 must be a new and discrete violation of the whistleblower protection statutes, or assuming that the December 14, 2000 action was the definitive adverse employment action, it must not have been reasonably discoverable that it was premised on retaliation until the employer's actions after March 5, 2001.<sup>18</sup>

Whether the March 16, 2001 action, or any other action alleged in the complaint is a new and discrete adverse employment action, or a latent discovery of retaliation, is a question of fact:

Upon a motion for a summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. *Ramsouer v. Midland Valley R. Co.*, D.C. Ark. 1942, 44 F.Supp. 523. All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. *Weisser v. Mursam Shoe Corporation*, 2 Cir., 1942, 127 F.2d 344, 145 A.L.R. 467.

Hunter v. Mitchell, 180 F.2d 763, 764 (D.C. Cir. 1950), citing Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016, 1018 (3d Cir. 1942). The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Gillian v. TVA, 1991-ERA-00031 (Sec'y Aug. 18, 1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). In the instant case, the affidavits of Robert Martin and Hugh B. Kaufman provided by complainant in support of his Opposition to Respondent's Motion to Dismiss, Or, In The Alternative, For Summary Decision, and attachments thereto, present a genuine issue of material fact. Contained within these affidavits are the allegations that complainant was allowed to resume Ombudsman duties, irrespective of the December 14, 2000

<sup>&</sup>lt;sup>18</sup>The complainant also advances a "continuing violation" theory. Complainant's Brief at 35. Under the equitable doctrine of continuing violation the complainant must show that a retaliatory act occurred within the statute of limitations period, and there is a connection between the alleged retaliatory acts. *Bonanno v. Northeast Nuclear Energy Co.*, 1992-ERA-00040 and 1992-ERA-00041 at 5 (Sec'y August 25, 1993). Assuming *arguendo*, that the March 16, 2001 memorandum is an impermissible act of retaliation occurring within the statute of limitations period, it must be determined whether the memorandum is an act of discrimination representing part of a "dogged pattern" of retaliation as the complainant alleges (Complainant's Brief at 37), or a mere effect of a definitive and final employment decision that occurred outside the filing deadline (Respondent's Brief at 18-19), Such is an issue of fact based on employer motivation, and in part, on determinations of credibility. Decision on this point must be reserved until the record is more developed.

notice to cease such duties, and consequentially, received superior work evaluations (Martin Declaration ¶ ¶ 9, 10, 14, 20; Kaufman Declaration ¶ ¶ 13, 14). Complainant further alleges that respondent's March 16, 2001 notice to cease ombudsman duties came five days after complainant allegedly engaged in protected activity (Martin Affidavit ¶ ¶ 11, 12; Kaufman Declaration ¶ ¶ 19, 20, 21, 31). Drawing the inferences in the light most favorable to the complainant, as the non-moving party, it is determined that the complainant has met his burden for defeating summary decision on this issue by presenting facts that, if believed, show the March 16, 2001 action by respondent, to be an independent act of retaliation to protected activity because the complainant was allowed to resume ombudsman work after the December 14, 2000 notification. Therefore the respondent's alleged action resulting in the removal of ombudsman responsibilities after the complainant was allegedly allowed to resume those duties could be considered a new discrete action upon which a compliant was timely filed.

### V. Actionable Adverse Employment Action

The respondent argues that the complainant's allegation of "badmouthing" found in his Complaint does not amount to an actionable adverse action. It is the respondent's contention that even if there is veracity to complainant's allegations that disparaging remarks were made about him by EPA officials, such acts never amounted to a tangible job detriment.

As pointed out by respondent, "[t]he adverse action element of a whistleblower claim requires a showing of a consequent tangible job detriment." Webb v. Carolina Power & Light Co., ARB No. 96-176,\*10, ALJ No. 1993-ERA-00042 (ARB Aug. 26, 1997), citing Varnadore v. Oak Ridge Nat'l Laboratory, Nos. 1992-CAA-00002 et al. (DOL Off. Adm. App., Jan. 26, 1996) ("two actions taken by employer that were motivated my discriminatory animus, a supervisor's warning to a co-worker not to be seen talking with complainant and the posting of a memorandum that placed the complainant in an unfavorable light, did not establish violations of the Clean Air Act's employee protection provision because they did not involve tangible job detriment and did not constitute a hostile work environment"), aff'd, Varndore v. Secretary of Labor, 141 F.3d 625 (6th Cir. 1998). Simply labeling behavior as "badmouthing" is insufficient; the complainant has the burden of presenting evidence that violative action by the respondent resulted in a tangible job detriment.

Respondent concedes that "badmouthing" will constitute a tangible job detriment when it occurs in the context of "blacklisting." *See Leveille v. New York Air Nat'l Guard*, Nos. 1994-TSC-00003 and 1994-TSC-00004 (Sec'y Dec. 11, 1995). Blacklisting is defined in *Leveille* as:

marking an employee for avoidance in employment because she engaged in protected activity, and communication of an adverse recommendation is evidence

<sup>&</sup>lt;sup>19</sup>Respondent's Brief at 21.

<sup>&</sup>lt;sup>20</sup>Respondent's Brief at 23.

of the decision to blacklist the employee. Blacklisting is quintessential discrimination, i.e., distinguishing in the treatment of employees by marking them for avoidance.

Id. at \*10. In the context of the case at bar, whether the alleged badmouthing of complainant by the respondent manifested into marking the complainant for avoidance in future employment is key as to whether blacklisting occurred. The complainant contends that the April 6, 2001 refusal of OSWER to allow complainant to apply for a newly-created position at the National Ombudsman office could be considered blacklisting. Complainant alleges that the badmouthing communication was made by the respondent to members of Congress and the public at large because "[the] EPA also continues to badmouth me in the press." Kaufman Declaration ¶ 21, 33, 35, 40; 56. Complainant offered no evidence that "badmouthing" to a third party resulted in his being "avoided" for a job opportunity, or even that disparaging remarks negatively affected the perception of the complainant held by a recipient of those disparaging communications. In this case, the behavior aggrieved is not what the case law intended to cover when it describes "blacklisting" because here the alleged badmouther is also the decision maker responsible for allegedly denying the employment opportunity. 22

The badmouthing, if proven as true, could be evidence of illegal animus by respondent toward complainant. In turn, this evidence of animus will support claims by the complainant that are actionable (meaning a claim with a tangible job detriment) including, but not limited to, demotion, or placing him at "an inferior position in the agency with loss of stature" based on protected behavior. Saufman Declaration § 56. The complainant has failed to show that badmouthing, by itself, has resulted in an independent adverse employment action with a tangible job detriment. Consequently, complainant cannot maintain an independent claim for badmouthing, as set forth in the complaint.

### Accordingly;

The Respondent's Motion To Dismiss is **DENIED** on the grounds that the complainant is a member of a federal union subject to a CBA containing a mandatory grievance procedure; and the unsuccessful argument that the complainant's Complaint is untimely. The Respondent's

<sup>&</sup>lt;sup>21</sup>Complainant's Brief at 38; Kaufman Declaration ¶ 37.

<sup>&</sup>lt;sup>22</sup>The individual(s) alleged to have engaged in badmouthing are Administrator Whitman and/or Acting Administrator Shapiro, the same individuals responsible for denying complainant the opportunity to fill the National Ombudsman support position. Kaufman Declaration ¶ 21, 37.

<sup>&</sup>lt;sup>23</sup>Complainant also alleges that badmouthing exists in hostile work environment. Complainant's Brief at 37, n. 40. However the allegation of a hostile work environment is not supported by any proffered evidence nor is it plead in any of the Complainant's Complaints. Hence this tribunal does not address this allegation.

Motion To Dismiss is **GRANTED** with respect to claims brought under the TSCA in the First and Second Complaint, and the claim brought under the ERA in the Second Complaint, because this tribunal lacks subject matter jurisdiction. With regards to the respondent's request to dismiss the claim for badmouthing, the Motion to Dismiss is **GRANTED** to the extent that the complainant may not recover for a claim of badmouthing; however, any evidence of badmouthing may be presented at the hearing as evidence of illegal animus resulting in an actionable adverse action.

SO ORDERED.

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THOMAS M. BURKE
Associate Chief Administrative Law Judge

Washington, D.C. TMB/ens